IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-556

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., and BROWNING-FERRIS INDUSTRIES, INC.,
Petitioners,

v.

KELCO DISPOSAL, INC., and JOSEPH KELLEY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE UNITED STATES CHAMBER OF COMMERCE, NATIONAL ASSOCIATION OF MANUFACTURERS, THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., THE BUSINESS ROUNDTABLE, AMERICAN CORPORATE COUNSEL ASSOCIATION, RISK AND INSURANCE MANAGEMENT SOCIETY, INC., PRODUCT LIABILITY ADVISORY COUNCIL, INC., AND THE PRODUCT LIABILITY ALLIANCE IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

The United States Chamber of Commerce, National Association of Manufacturers, Motor Vehicle Manufacturers Association of the United States, Inc., the Business Roundtable, American Corporate Counsel Association, Risk and Insurance Management Society, Inc., Product Liability Advisory Council, Inc., and the Product Liability Alliance, with the consent of the parties, hereby file this

brief as *amici curiae* in support of the Petitioners.[1] The *amici* and their members represent the interests of the nation's business and manufacturing community.

The U.S. Chamber of Commerce is America's largest federation of businesses, representing more than 180,000 companies, several thousand trade and professional associations, and hundreds of state and local Chambers of Commerce. The National Association of Manufacturers is an association of approximately 13,500 companies and subsidiaries that together employ 85% of all manufacturing workers in the United States and produce more than 80% of the nation's manufactured goods. The Motor Vehicle Manufacturers Association is a trade association whose member companies build motor vehicles and manufacture industrial, lawn and agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches and gasoline and diesel engines for various industrial and agricultural uses.

The Business Roundtable is an association of some 200 chief executive officers of companies from a variety of businesses and geographic locations who examine public issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

The American Corporate Counsel Association is a national bar association of approximately 7500 attorneys from the legal staffs of corporations and other business entities in the private sector who are called upon to advise their clients regarding litigation and settlement of claims filed against them. The Risk and Insurance Management Society, Inc., the world's largest association of risk management professionals, consists of approximately 4,200 industrial and service corporations, governmental bodies and nonprofit organizations.

The Product Liability Advisory Council, Inc., is an association of industrial companies that was formed for

[1] Consent letters have been filed with the Clerk.

the principal purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. The Product Liability Alliance consists of more than 300 manufacturing businesses, wholesaler-distributors and trade associations from a wide range of industries, and was formed in 1981 for the purpose of seeking uniform federal product liability laws.

This case is of interest to the *amici* because their members and clients are the primary victims of a punitive damages system which the legislatures and the trial and appellate courts have failed to exercise their constitutional duties to control. As the principal voice of the business and manufacturing communities, the *amici* are well suited to present to the Court the effects of unrestrained, disproportionate punitive damage awards on commercial enterprises, and the reasons that such awards violate the Excessive Fines Clause of the Eighth Amendment.

STATEMENT OF THE CASE

This case arises out of a civil action brought by respondent Kelco Disposal, Inc. and Joseph Kelley ("Kelco") in the United States District Court in Vermont, alleging that petitioners Browning-Ferris Industries of Vermont, Inc. and Browning-Ferris Industries, Inc. ("Browning-Ferris") attempted to monopolize the waste-disposal industry in Burlington, Vermont. A jury returned a verdict for Kelco of $51,146 in compensatory damages on a federal antitrust count, and $51,146 in compensatory damages and $6 million in punitive damages on a state law count of tortious interference with contractual relations. Petitioners attacked the $6 million punitive damages award as a violation of the Excessive Fines Clause of the Eighth Amendment. The Court granted *certiorari* on December 5, 1988. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988).

SUMMARY OF ARGUMENT

The Excessive Fines Clause of the Eighth Amendment requires proportionality between the gravity of wrongdoing and the fines that are imposed to punish and deter such wrongdoing, regardless of whether the fines are denominated criminal fines, civil fines, punitive damages awards fixed in amount by statute, or punitive damages awards imposed by juries exercising discretion. The required proportionality cannot systematically obtain, however, if the fines are imposed as punitive damages under laws that (1) only loosely define the conduct and culpability that must be proven before punishment can be imposed, (2) give juries unbridled discretion to choose whether or not to impose punishment once the requisite culpability has been established, (3) provide neither fixed limits nor cognizable standards to guide juries in deciding what amount of punishment to inflict, and (4) provide reviewing courts with no objective standard against which to determine the propriety of punitive damages awards. Because it would be purely fortuitous for punitive damages awarded under such a standardless system to promote proportionality or any other legitimate penal purpose, such awards presumptively violate the Excessive Fines Clause. At a bare minimum, such awards should be subject to heightened scrutiny.

In addition, even if punitive damages are imposed pursuant to guidelines that pass constitutional muster, the proportionality, and therefore the constitutionality, of any particular punishment must be determined by reference to objective standards. At a bare minumum, when a state establishes no standards for determining punitive damages awards, an award violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fines for conduct of the same or similar gravity, (2) the maximum legislatively established civil fines for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity,

and (4) the maximum discretionary punitive damages award judicially approved for conduct of the same or similar gravity in the same state.

STATEMENT

Punitive damages are penal in nature. Punitive damages are intended not to compensate plaintiffs, but to punish defendants, and to deter persons similarly situated from acting improperly in the future.[2] Because of the characteristics described below, the punitive damages systems in most states fail to further their legitimate purposes.

A. Primary Characteristics of the Prevailing Punitive Damages System

The punitive damages system that exists in the United States today is characterized by: (1) an absence of clear standards for defining the conduct and culpability on which punitive damages may be based; (2) an absence of any standard to determine whether punitive damages should be awarded, once the requisite culpability has been found; (3) an absence of standards for determining the appropriate amount of punitive damages; (4) an absence of objective standards for judicial review; (5) an inappropriate burden of proof; (6) the admissibility of prejudicial evidence of the defendant's wealth even during the trial of liability and compensatory damages issues; and (7) in mass product liability and tort cases, the imposition of multiple punishments for a single act.[3]

---

[2] *See* W. Prosser & W.P. Keeton, *The Law of Torts* § 2, at 9 (5th ed. 1984); C. McCormick, *Handbook on the Law of Damages* § 77, at 275 (1935); D. Dobbs, *Handbook on the Law of Remedies* § 3.9, at 204 (1973); W. Prosser, J. Wade & V. Schwartz, *Torts: Cases and Materials* 528-29 (8th ed. 1988); M. Franklin & R. Rabin, *Tort Law and Alternatives: Cases and Materials* 622 (4th ed. 1987). *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

[3] The first four of these characteristics were present in this case; the last three are additional problems that elsewhere contribute to excessive punitive damages awards.

1. *The Absence of Clear Standards for Defining Conduct and Culpability on Which Punitive Damages May Be Based*

The terms used by state courts to describe the conduct or culpability that must serve as the basis for an award of punitive damages are diverse, contradictory and, in most cases, hopelessly vague.[4] In this case, for example, the district court instructed the jury that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. Juries in other states are told to impose damages if they find that the defendant acted with "wanton or reckless disregard for the rights of others." *See, e.g., American Laundry Machinery Industries v. Horan*, 412 A.2d 407, 419 (Md. Ct. Spec. App. 1980). Other states say that "gross negligence" is enough. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987). Some speak of "rudeness" or mere "caprice." *See Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). None of those terms is defined or circumscribed by objective guidelines.

2. *The Absence of Standards for Determining Whether Punitive Damages Should Be Awarded, Once the Requisite Culpability Has Been Found*

Once it determines that a defendant's misconduct meets the threshold of culpability, the jury has unbridled discretion to award or withhold punitive damages. *See* W. Prosser & W.P. Keeton, *The Law of Torts*, *supra* n.2, § 3, at 14. The jury is given no standard or guideline describing how to exercise that discretion. The jury simply is instructed that it may award punitive damages to the plaintiff if it finds the defendant acted with the requisite culpability. *See, e.g.*, C.A. 1180.

[4] For a comprehensive survey of state laws concerning punitive damages, *see* R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* (1988).

3. *The Absence of Standards for Determining the Appropriate Amount of Punitive Damages*

The great majority of states, including Vermont, establish no standards or guidelines that juries or courts must use to determine the maximum permissible award in a case. No relationship is established between the harm caused and the size of the punitive award, or between compensatory damages and punitive damages. Nor is any relationship established to parallel criminal fines, civil fines, or prior punitive damages awards in the same jurisdiction. Unlike criminal fines and civil fines denominated as such, no standard is established to ensure that punishments in cases involving the same misconduct are approximately the same. Nor is there any amount of punitive damages that a jury may award under the general punitive damages laws.[5]

Generally, as in this case, no instruction is given as to what must be considered or what must not be considered by the jury in determining the amount of punishment. No instruction regarding the deterrent and retributive functions of compensatory damages and defense costs is given.

The clearest point in most instructions is an invitation to consider the defendant's wealth. *See, e.g., Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 459-60 (1980); *Sturm, Ruger & Co. v. Day*, 594 P.2d

[5] A few states have enacted specific limitations on general punitive damages awards. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-240b (West 1988) (punitive damages limited to two times compensatory damages); Colo. Rev. Stat. § 13-21-102 (Supp. 1986) (punitive damages limited to amount of actual damages; Fla. Stat. Ann. § 768.73 (West Supp. 1988) (punitive damages limited to three times compensatory damages).

38, 47-48 (Alaska 1979). As a result, the jury's only meaningful guideline for determining the amount of a punitive award is often the size of the defendant's purse. *See* D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation, The Story Behind the Statistics* 21 (1987).

4. *The Absence of Objective Standards for Judicial Review*

The absence of standards to support either an award of punitive damages or calculation of the amount undermines the effectiveness of the trial courts' power to invoke remittitur, and the appellate courts' power to reverse. Most appellate courts reduce punitive damages awards only if they somehow intuit them to be infected by "passion or prejudice." Others, such as courts in Vermont, will take action only if they somehow conclude that the award is "manifestly and grossly excessive." *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974).

In making these determinations, the courts themselves do not apply objective standards. Instead they substitute their own subjective notions for those of the juries. As one court candidly conceded, "Our reaction is admittedly visceral." *Rosenbloom v. Metromedia, Inc.*, 289 F. Supp. 737, 749 (E.D. Pa. 1968), *rev'd on other grounds*, 415 F.2d 892 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971).

5. *Inappropriate Burdens of Proof*

The Constitution requires that criminal cases be proved "beyond a reasonable doubt" and that certain civil cases be proved by "clear and convincing evidence." *In re Winship*, 397 U.S. 358, 364, 368 (1970) (criminal proceedings); *Santosky v. Kramer*, 455 U.S. 745, 762 (1982) (civil custody proceedings). Nevertheless, for punitive damages, most courts have held that proof by a mere "preponderance of the evidence" standard is

enough. *See* J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 9:12 (1985).[6]

6. *Admissibility of Prejudicial Evidence*

Only five states require bifurcated proceedings separating the trial of punitive damages from other issues.[7] Thus, most plaintiffs who seek punitive damages may introduce evidence of the defendant's wealth during their case in chief. Although such evidence is admissible only for the narrow purpose of determining the amount of punishment, the jury cannot effectively exclude it in determining whether the defendant is liable, the amount of compensatory damages to award, and whether the culpability required for punitive damages has been established.

7. *Multiple Punitive Damage Awards for a Single Act*

Manufacturers of products found by juries to be defective can be exposed repeatedly to punitive damage assessments.[8] The current punitive damages system has

---

[6] Several states recently have recognized the penal nature of punitive damages and have imposed a higher burden of proof. At least nineteen states now require proof by "clear and convincing evidence" for punitive damages. *See, e.g.*, Ala. Code § 6-11-20 (Supp. 1987); Alaska Stat. § 09.17.020 (1986); *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); Cal. Civ. Code § 3294(a) (West 1989). One state, Colorado, uses proof "beyond a reasonable doubt," the level of proof used in criminal cases. *See* Colo. Rev. Stat. § 13-25-127(2) (Supp. 1986).

[7] *See* Conn. Gen. Stat. § 52-240b (Supp. 1987); Ga. Code Ann. § 51-12-5.1(d)(2) (Supp. 1988); Kan. Stat. Ann. § 60-3701 (Supp. 1987); Mo. Ann. Stat. § 510.263 (Supp. 1989) (bifurcation if requested by any party; Mont. Code Ann. § 27-1-221(7)(a) (1987). One state, New Jersey, has a trifurcated procedure. *See* N.J. Rev. Stat. § 2A:58C-5(c) (1987) (first proceeding on compensatory damages; second proceeding on punitive damages liability; third proceeding on the amount of punitive damages). Colorado does not allow evidence of the defendant's income or net worth to be considered at all. *See* Colo. Rev. Stat. § 13-21-102(6) (Supp. 1986).

[8] Serial trials frequently result in disparate punitive damage awards in different cases arising from exactly the same facts. For example, numerous product liability cases were filed against the

developed no effective way to account for this phenomenon—each jury visits the question as if it were the *only* one looking at punitive damages.

B. Effects of the Current Punitive Damages System

A comprehensive analysis of jury verdicts in the United States prepared by the RAND Institute for Civil Justice shows that the growth in the average award in product liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1000 percent" from the period 1960-1964 to 1980-1984. D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends In Tort Litigation: The Story Behind The Statistics*, *supra*, p. 8, at 18. That explosion has been paralleled by a dramatic increase in both the frequency and the size of punitive damages awards against manufacturers.

Before 1970, for example, there was only one reported appellate court decision upholding an award of punitive damages in a product liability case, an award of $250,000. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Today, hardly a month goes by without a multi-million-dollar punitive damages verdict against a manufacturer.[9]

manufacturer of the drug Bendectin. These claims have resulted in jury verdicts in favor of the defendant (*see, e.g., Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544 (S.D. Ga. 1986)); summary judgment for the defendant on the issue of liability for compensatory damages (*see, e.g., Lynch v. Merrell-National Laboratories, Div. of Richardson-Merrell, Inc.*, 830 F.2d 1190 (1st Cir. 1987) (affirming district court's grant of summary judgment for defendant because plaintiffs failed to show Bendectin caused birth defects)); summary judgment for the defendant on the issue of punitive damages (*see, e.g., Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334 (N.D. Ill. 1988)); and a jury verdict of a punitive damages award for $75 million (*see Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) (punitive damages remitted to zero)).

[9] *See, e.g., Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 464 N.E.2d 1011 (1984) ($15 million punitive damages verdict,

The empirical data show that the standardless punitive damages systems described above, selectively aimed at corporations and other "deep pockets," [10] have had drastically deleterious effects on the range of products made available to further the health, comfort, and productivity of the American public, and on the ability of manufacturers equitably to settle other claims. Some of these effects are discussed below.

1. *Withdrawal of Products From the Marketplace*

The general aviation industry produced 18,000 aircraft per year in 1978 and 1979, but fewer than 1,000 in 1988. *See* H.R. Rep. No. 748, 100th Cong., 2d Sess.

remitted to $650,000); *Cessna Aircraft Co. v. Fidelity & Casualty Co.*, 616 F. Supp. 671, 673 (D.N.J. 1985) ($25 million punitive damages verdict); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) ($100 million punitive damages verdict, remitted to $10 million); *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million punitive damages verdict); *Ealy v. Richardson-Merrell, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 740 (D.D.C. Oct. 1, 1987) ($75 million punitive damages verdict, remitted to zero); *Kemner v. Monsanto Co.*, 15 Prod. Safety & Liab. Rep. (BNA) 884 (Ill. Cir. Ct. Oct. 22, 1987) ($16.25 million punitive damages verdict); *George v. Raymark Industries, Inc.*, 15 Prod. Safety & Liab. Rep. (BNA) 865 (Del. Super. Ct. Nov. 9, 1987) ($75 million punitive damages verdict); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) ($10 million punitive damages verdict); *Rajala v. Allied Corp.*, No. 82-2282K (D. Kan. Apr. 25, 1988), *appeal docketed*, (10th Cir. May 9, 1988) ($60 million punitive damages verdict); *Masaki v. General Motors Corp.*, 16 Prod. Safety & Liab. Rep. (BNA) 225 (Haw. Ct. App. Feb. 29, 1988) ($11.25 million punitive damages verdict), *petition for cert. filed*, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988); *Batteast v. Wyeth Laboratories, Inc.*, 172 Ill. App. 3d 114, 526 N.E.2d 428 (1988) ($13 million punitive damages verdict); *FDIC v. W.R. Grace Co.*, 691 F. Supp. 87 (N.D. Ill. 1988) ($75 million punitive damages verdict).

[10] *See* M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings* 50 (1987); D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind The Statistics*, *supra* p. 8.

24 (pt. 1) (1987) (statement of Edward W. Stimpson, President, General Aviation Manufacturers Assoc., Before the House Subcomm. on Commerce, Consumer Protection and Competitiveness). The decreased production was heavily influenced by punitive damages awards in cases such as *Cannuli v. Cessna Aircraft Co.*, Nos. 80-3285, 81-2209, 82-1052 (D.N.J. 1984) ($25 million).

United States manufacturers of medical equipment similarly have abandoned certain markets. For example, Puritan-Bennett, a major domestic manufacturer of hospital equipment, stopped making anesthesia gas machines in 1984 because of rising liability costs, leaving two foreign manufacturers to dominate a market once filled by a half-dozen competitors. *See* Brody, *When Products Turn into Liabilities*, Fortune, Mar. 3, 1986, at 22.[11]

This phenomenon affects even the so-called "leisure" industries. For example, in 1976 there were eighteen manufacturers of football helmets. Now there are two. *See* Brown, *Insurance Costs, Lawsuits Injure U.S. Sports*, J. Com., July 13, 1988, at A1, col. 2, A14, col. 5.

2. ***Reduced Development of New and Useful Products***

A 1988 Conference Board survey of 4,000 companies in the United States reported: "About a third of all the firms surveyed—and nearly half of those reporting major impacts—have decided against introducing new products because of liability fears." *See* E.P. McGuire, *The Impact of Product Liability*, vii (1988). Several specific examples of this phenomenon have been reported:

[11] An $8 million punitive damages award against the sole manufacturer of the polio vaccine on the theory that it had produced the wrong type of vaccine (the Sabin rather than the Salk vaccine) "almost jeopardized the viability of the entire polio vaccination program." Fortunately, the decision was reversed by a four-to-three vote of the Kansas Supreme Court in *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987).

- The President of Unison Industries, Inc., explained that his firm is *withholding an advanced electronic ignition system for light aircraft from the market* because of the liability risk that might result from its release and use. *Id.*
- The Chairman of the Board of Union Carbide Corporation reported that his company decided to *forgo development of a suitcase sized kidney dialysis* unit because "we believed [the] size of any damage claims and the probable cost of defending ourselves, made the whole thing uneconomic." Remarks of W. Anderson at the Annual Meeting of National Association of Casualty and Surety Executives (Oct. 7, 1986). He further reported that "it was the same reason we decided to *forgo offering IV equipment and the food packages for intravenous feeding* to our medical oxygen customers. It would have been a good service and a good business, but the costs of defending ourselves against the inevitable lawsuits caused us to drop it." *Id.* at 3 (emphasis added).

Similarly, the Chairman and Chief Executive Officer of Monsanto Company reported that, because of the uncertain punitive damages system, Monsanto

> abandoned a possible substitute product for asbestos just before commercialization, not because it was unsafe or ineffective, but because a whole generation of lawyers had been schooled in asbestos liability theories that could possibly be turned against the substitute.

See Mahoney, *Punitive Damages: The Courts are Curbing Creativity*, N.Y. Times, Dec. 11, 1988, § 3, at 3, col. 1.

The project director for the National Academy of Sciences report, *Confronting AIDS—Directions for Public Health, Health Care, and Research*, stated, "[T]his general climate of uncertainty is something that deters many pharmaceutical companies from being involved in

AIDS vaccine research." *See Insurance Costs Deter AIDS Vaccine*, 1 Liab. & Ins. Bull. (BNA), at 5 (Nov. 3, 1986).

3. Effects on Settlements

A study conducted by the United States Department of Justice on the liability crisis indicated that uncertainties in the punitive damages system "serve as a significant obstacle to the settlement process by giving the plaintiff unrealistic expectations of the value of his case even where the defendant has made a generous settlement offer." *See* R. Willard & R. Willmore, *An Update on the Liability Crisis: Tort Policy Working Group*, *supra* n.11. "It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon." *Id.* (quoting Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J.L. Ref. 575, 612 (1985)). Empirical data indicate that, in those claims in which claimants sought punitive damages, claim settlements rose an average of about ten percent. *See* ISO DATA, Inc., *Claim File Data Analysis: Technical Analysis of Study Results* 86-87 (Dec. 1988).

In sum, the lack of standards and arbitrariness of the punitive damages system has had a substantial and adverse impact on productivity in the United States.

ARGUMENT

I. PUNITIVE DAMAGES JUDGMENTS BASED ON UNCHANNELED JURY DISCRETION PRESUMPTIVELY VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

The general punitive damages laws of Vermont and many other states give juries license to inflict such punishments arbitrarily and on the basis of prejudice. They permit juries to set the amount of punishment without reference to any cognizable standard. And they provide no objective standard for judicial review.

Under such systems, any relationship between the punishments imposed and the legitimate purposes of punishment is purely fortuitous. When a state chooses to employ a system that does little or nothing to ensure that punitive awards are even minimally channeled to promote their avowed legitimate purposes, punishments imposed under that system presumptively violate the Excessive Fines Clause of the Eighth Amendment.

A. The Excessive Fines Clause Requires Proportionality

In *Solem v. Helm*, 463 U.S. 277, 290 (1983), the Court held that the Eighth Amendment requires "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Although the Court was there applying the Cruel and Unusual Punishment Clause to an excessive prison sentence, the Court observed that the amendment "imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289 (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). Also, in explaining why the Cruel and Unusual Punishment Clause requires proportionality for prison sentences, the Court took as beyond dispute that the Excessive Fines Clause requires proportionality for fines. *See* 463 U.S. at 288-90. Finally, in describing the proportionality requirement's roots in Magna Carta, the Court observed that the requirement derived from Magna Carta's prohibition against disproportionate amercements, which were "similar to a modern-day fine." 463 U.S. at 283 n.8 and accompanying text. Accordingly, *Solem* teaches that proportionality between the wrongs inflicted and the fines imposed is the bedrock requirement of the Excessive Fines Clause.[12]

[12] As shown at length by the brief *amicus curiae* submitted by *Golden Rule Insurance Co., et al.*, the history of the Excessive Fines Clause leaves no doubt that the clause was intended to apply to civil as well as criminal fines. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986);

B. Punitive Damages Awards Based on Unchanneled Jury Discretion Fail to Provide Proportionality or to Promote Any Other Legitimate Penal Purpose

The very essence of the proportionality requirement is consistency in the relationship between punishment and wrongdoing from case to case: the punishment imposed in one case for a particular misdeed must be similar in severity to punishments imposed in other cases for misdeeds of similar gravity, greater than punishments imposed in other cases for misdeeds of lesser gravity, and less than punishments imposed in other cases for misdeeds of greater gravity. Magna Carta indicated as much:

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence . . . .

Magna Carta, ch. 20, *quoted in* W. McKechnie, *Magna Carta* 284 (2d ed. 1958). So has the Court. *See Solem*, 463 U.S. at 284-85. So, too, have moral philosophers of virtually every persuasion. *See generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-57 (1972), (*discussing* I. Kant, *The Philosophy of Law* 194-98 (W. Hastie transl. 1887); J. Bentham, *An Introduction to the Principles of Morals and Legislation* 178-91 (1789)).

Note, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 Cal. L. Rev. 1433, 1441-47 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987). This Court has recognized punitive damages as a form of civil fine. *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). This brief therefore does not further address the question of the Excessive Fines Clause's applicability to punitive damages judgments.

The proportionality requirement is a vital corollary of the broader constitutional prohibition "against arbitrary and discriminatory punishment." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying Due Process Clause). *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As the Court has recognized in a variety of contexts, the required consistency and prevention of arbitrariness and unjust discrimination cannot be achieved unless punishments are imposed pursuant to cognizable, objective standards. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. . . . Otherwise, 'the system cannot function in a consistent and rational manner.'"); *cf. Giaccio*, 382 U.S. at 402 (Due Process Clause violated by "vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs"). In the absence of such standards, juries can silently base their decisions to punish, and the severity of their punishments, upon invidious discrimination, prejudice, and even whim. Every punishment so motivated, no matter how small, would be excessive. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Punishments therefore must be constrained by cognizable limits and guidelines fixed before the defendant has acted. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"); *Giaccio*, 382 U.S. at 405 n.8 (referring to constitutionality of allowing juries "to fix punishment *within legally prescribed limits*") (emphasis added).

A related constitutional infirmity in a system that allows the imposition of fines not limited by predetermined standards is this: such a system violates the principle of fundamental fairness reflected in the Constitution's proscription of *ex post facto* laws, a proscription that invalidates "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 390 (1798) (Chase, J., separate opinion).[13]

Without predetermined standards for punishments, the *ex post facto* principle would be eviscerated. When a state's legislature and courts leave the size of fines to juries' unchanneled discretion, no fine of any magnitude can ever be said to have changed the punishment or to have inflicted a punishment greater than that allowed when the wrongdoing was committed.

The general punitive damages laws of Vermont and most other states violate these excessiveness principles. Because the jury's decision whether to award punitive damages, once the requisite culpability has been established, is unreviewable and may be based upon anything at all, it would be pure happenstance if any particular punitive award were to be proportionate to the wrongdoing committed or serve any other legitimate purpose. In other instances of the same (or more culpable) conduct by other defendants, juries may have awarded only compensatory damages and refrained, on the basis of bias, caprice, or sympathy, from awarding punitive damages. *Cf. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart,

[13] *Accord Lindsey v. Washington*, 301 U.S. 397, 401 (1937) ("The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."); *In re Medley*, 134 U.S. 160, 171 (1890) ("no one can be criminally punished in this country except according to a law prescribed . . . before the imputed offense was committed, or by some law passed afterwards, by which the punishment is not increased").

J., concurring) (Capital punishment imposed under the challenged statute was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").[14]

It is no answer for Vermont and others to assert that this is merely an exercise of jury discretion. *See, e.g., Pezzano v. Bonneau*, 133 Vt. 88, 90, 329 A.2d 659, 660. The authority that juries are exercising is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo v. Hopkins*, 118 U.S. at 366-67 (reviewing exercise of discretion in Fifth Amendment context).

> [D]iscretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. Otherwise, . . . "[i]t is always unknown: It is different in different men: . . . In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable."

McGautha v. California, 402 U.S. 183, 285 (1971) (Brennan, Douglas & Marshall, JJ., dissenting).

[14] Problems with the standardless nature of punitive damages laws arise even in determinations of whether the requisite culpability has been established. Here, for example, the jury was told that punitive damages could be based on "extraordinary misconduct," "outrageous conduct," or "a willful and wanton or reckless disregard of the plaintiff's rights." C.A. 1180. None of those terms was defined. In *Giaccio*, the Court held "reprehensible," "improper," "outrageous to morality and justice," and "misconduct" impermissibly vague as tests for juries to employ in deciding whether to require an acquitted defendant to pay $230.95 in court costs. 382 U.S. at 403. *See also Smith v. Wade*, 461 U.S. 30, 88 (1983) (Rehnquist & Powell, JJ., & Burger, C.J., dissenting) ("a vaguely defined, elastic standard like 'reckless indifference' gives free reign to the biases and prejudice of juries").

Nor is it prohibitively difficult for legislatures or courts to establish limits on, or objective standards for, punitive damages awards in order to ensure at least rough proportionality. Vermont, for example, has fixed maximum criminal fines for the entire panoply of criminal acts (*see, e.g.*, Appendix "C"); maximum civil penalties for a wide variety of civil misconduct (*see, e.g.*, Appendix "B"); and maximum punitive damages for still other civil misconduct (*see, e.g.*, Appendix "A"). Some of these fixed civil fines and punitive awards are for conduct that is similar in effect and culpability to antitrust conduct. *See, e.g.*, Vt. Stat. Ann. tit. 9, § 2461 (1984 & Supp. 1986) (treble damages for consumer fraud); Vt. Stat. Ann. tit. 5, § 1819 (1972 & Supp. 1986) (civil fines of specified sums for granting or consenting to special rebates). And, of course, Congress and dozens of state legislatures have established treble damages as the appropriate punitive damages for antitrust conduct such as the predatory pricing at issue in this case.

Nor has the application of these standardless laws, accompanied by an instruction that punitive damages are to punish and deter, generated a body of discernible, consistently applied common law guidelines. As the Court stated in another context:

> All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is.

Giaccio, 382 U.S. at 403.

Predictably, this system has resulted not in consistent application of sound principles, but in identifiable discrimination against at least one group: corporate defendants. Researchers for the RAND Institute of Civil Justice concluded that "[c]orporate defendants are in fact more likely than individuals or public agents to be

the target of [punitive damages] awards" and that "[p]unitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases." M. Peterson, S. Sarma & M. Stanley, *Punitive Damages: Empirical Findings*, *supra* n. 10.

The excessiveness of punitive damages also results from unchanneled discretion exercised by juries in fixing the *amount* of the awards after the decision to impose punishment has been made. In various opinions in the last two decades, the Court has explicitly stated as much.[15]

Once again, neither proportionality nor any other cognizable standard is likely to be satisfied under these con-

---

[15] *See Gertz*, 418 U.S. at 350 (punitive damages laws leave juries "free to use their discretion selectively to punish expressions of unpopular views") (Powell, Marshall, Blackmun & Rehnquist, JJ.); *Foust*, 442 U.S. at 50 n.14 ("punitive damages may be employed to punish unpopular defendants") (Marshall, J., joined by Brennan, Stewart, White & Powell, JJ.); *Smith v. Wade*, 461 U.S. at 59 ("punitive damages are frequently based upon the caprice and prejudice of jurors") (Rehnquist, J., Burger, C.J. & Powell, J., dissenting); *cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) ("Because evidence of a tort-feasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award.") (Blackmun, J., joined by Burger, C.J., Stewart, White, Powell & Rehnquist, JJ.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 74-75 (when punitive damages "bear no relationship to the actual harm caused, they then serve essentially as spring-boards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an "infinitely wide range of penalties wholly unpredictable in amount. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the State to permit punitive damages that bear no discernible relationship to the actual harm caused.") (Harlan, J., dissenting); *id.* at 84 ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others.") (Marshall, J., dissenting).

ditions. Because juries are not even told that the punishment they inflict should be proportionate to the wrongdoing involved, and because they are not told what punishments have been imposed for similar misconduct in other cases, any case-to-case consistency in the relationship between the severity of punishment and the gravity of wrongdoing must be purely fortuitous. Similarly, because juries are not given any guidance regarding the principles of deterrence or retribution, any relationship between those principles and the juries' awards must be wholly accidental.

Moreover, effective deterrence does not require such untrammeled discretion. Deterrence theory assumes that potential actors will rationally weigh the benefits and costs likely to flow from contemplated wrongful conduct. Rational deterrence obtains, therefore, only if the actors are informed about the magnitude of the costs, including punishments, they are likely to incur if they engage in the proscribed conduct. If laws fail to establish standards for punitive damages awards, actors contemplating wrongful conduct can only guess at the likely consequences of their misdeeds.

Rational deterrence also requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the actors' expected costs (i.e., actual costs adjusted upward to account for the probability that the conduct will not be detected and successfully prosecuted by injured persons and that punishment will not be imposed), will equal any gain that they would otherwise expect to obtain from the contemplated wrongful conduct. *See* H. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982); Note, *Punitive Damages for Libel*, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity.

Punitive awards imposed pursuant to standardless jury submissions also fail to serve the state's retributive purposes. The basic test of the propriety of punishment as retribution is that the punishment must be proportionate to the wrongdoing. *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 846 (1972). Punitive damages imposed pursuant to standardless jury submissions violate the proportionality requirement, as already shown above.

The $6 million punitive award against Browning-Ferris in this case illustrates the vices of the standardless scheme. First, an award of that size was unpredictable. Browning-Ferris could not have known that its pricing activities could result in such an award. The highest reported prior punitive damages award under Vermont law, for any type of conduct of even the most heinous nature, had been only $300,000, in *Greenmoss Builders, Inc. v. Dunn & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 472 U.S. 749 (1985). *See* Appendix "E."

Similarly the $6 million award was in the nature of an *ex post facto* increase in the punishment for Browning-Ferris' conduct. All prior conduct of the same or greater degree of culpability, or that had caused actual harm equal to or greater than that caused by Browning-Ferris, had resulted in punitive damages in markedly lower amounts, or in no punitive damages at all.

Further, and for the same reason, the $6 million punitive award cannot be said to be proportionate to the gravity of Browning-Ferris' wrongdoing. It is improbable that, in the 200-year history of Vermont, no more heinous act had ever been committed and presented to a jury by a plaintiff seeking punitive damages. It is even more improbable that, as implied by the twenty-to-one ratio between the $6 million award and the previous highest award of $300,000, Browning-Ferris' pricing activities were approximately twenty times more heinous, harmful or difficult to deter than any previous act by any person or entity in Vermont history.

Finally, the $6 million punitive damages award cannot be said to be justified by the injury inflicted by Browning-Ferris' misconduct, or the wrongful gain that the misconduct might reasonably have been expected to generate. The jury found that the injury was only $51,146. And the only "gain" derived by Browning-Ferris was its *loss* of greater and greater amounts of business to Kelco, such that Browning-Ferris ultimately had to leave the market altogether. Even if a substantial adjustment were made to account for the possibility that Browning-Ferris' challenged pricing practices might have proved more successful, the sum required to deter such conduct would not approach $6 million.

In sum, it is apparent that punitive damages are imposed in Vermont pursuant to laws that specify no limits, no required relationship to culpability, no required relationship to the punishments for other acts of wrongdoing, and no other objective standards for determining when and in what amount they are to be imposed. Punitive awards thus imposed serve no valid state interest.[16] Under these circumstances, the state's legislature, or its courts through common law development, should be required to "replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing [punishment]." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).[17]

[16] As the Court previously has declared, "[s]tates have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

[17] *See generally United States v. Evans*, 333 U.S. 483, 486 (1948) ("In our system, so far at least as concerns the federal process, defining crimes and fixing penalties are legislative, not judicial functions."); *United States v. Batchelder*, 442 U.S. at 125-26 (discussing "the Legislature's responsibility to fix criminal penalties"); *Gregg v. Georgia*, 428 U.S. at 174 n.19 (plurality opinion) ("legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values").

In particular, the state's legislature or courts should be required to establish objective standards to guide and limit juries in determining when, and in what amounts, punitive awards may be imposed. At a bare minimum, if the state's legislature and courts choose to continue to abdicate that responsibility, punitive awards under that state's laws should be subjected to heightened judicial scrutiny under the Eighth Amendment.

II. A PUNITIVE DAMAGES AWARD THAT EXCEEDS EVERY LEGISLATIVELY ESTABLISHED MAXIMUM CRIMINAL FINE AND CIVIL FINE, INCLUDING LEGISLATIVELY ESTABLISHED PUNITIVE DAMAGES, FOR LIKE CONDUCT IN THE SAME AND OTHER STATES VIOLATES THE PROPORTIONALITY REQUIREMENT OF THE EXCESSIVE FINES CLAUSE

Even when a state has specified limits on the punishments permitted for various forms of wrongful conduct and has thereby provided objective guidelines regarding proportionality, a punishment *within* those limits may nevertheless violate the Excessive Fines Clause. *Solem*, 463 U.S. 277. In deciding whether such a violation exists,

> a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem, 463 U.S. at 292.

Although that holding was articulated in the context of a proportionality analysis of a legislatively fixed maximum prison sentence, the principle that Eighth Amendment proportionality analysis should be guided by objective criteria applies with equal force to other forms of punishment, including civil fines. *See Solem*, 463 U.S. at

289 ("Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments" (quoting *Ingraham*, 430 U.S. at 664)). If, as occurred here, the punishment has been imposed under a system with no specified limit or guideline, it can overcome its presumptive excessiveness only if its relationship to the available objective criteria can be demonstrated under a heightened Eighth Amendment scrutiny.[18]

The sources of relevant objective criteria are plentiful. To analyze the proportionality of a punitive damages

[18] The court of appeals below did not consider the *Solem* proportionality criteria or any related criteria. Instead, because the punitive award was less than one percent of the defendants' net worth, the court concluded that the award "was not inconsistent with punitive damages levied in other jurisdictions against large corporations" and "was not motivated by prejudice." 845 F.2d at 410.

There is neither a retributive nor deterrent rationale for the court of appeals' approach. If a defendant is to be punished, it should be punished for the gravity of the misdeed (as roughly indicated, for example, by the harm caused or threatened), not for the fact of being large. Especially where the misdeed is a purely economic one, such as pricing activity, the defendant's status has no legitimate retributive role.

Nor is a larger penalty necessary for deterrence. The size of the penalty needed for deterrence is determined by reference to the expected gain from the specific misconduct. Because it is often enough the case that the defendant's expected gain is equal to the plaintiff's expected loss (theft cases being one example), it makes sense to use compensatory damages as a rough measure of expected wrongful gain and, accordingly, as the basis for the appropriate punitive damages awards. But no such theory of deterrence makes the size of the penalty awarded for deterrence turn on the defendant's wealth. To the contrary, in most instances, a penalty that, together with compensatory damages and other costs, is sufficient to make the expected cost exceed the expected gain will deter the undesirable conduct. *Cf. Smith v. Wade*, 461 U.S. at 94 (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). That will be true regardless of the actor's wealth; General Motors is no more likely than a small, specialty-car manufacturer to engage in misconduct whose expected cost exceeds the expected gain.

award for a particular misdeed, a court can look to (1) the criminal fines imposed in other instances in the same and other jurisdictions; (2) civil fines authorized for similar conduct in the same state and in other states; (3) civil fines in the nature of legislatively fixed punitive damages awards (whether fixed dollar sums, fixed multiples of compensatory damages, or sums fixed in some other manner, such as by reference to reasonable attorney's fees) for similar and dissimilar conduct in the same state and in other states; and (4) punitive damages awards imposed by juries, and upheld by courts applying meaningful standards, for similar and dissimilar conduct in the same state.

To determine whether the $6 million punitive damages award in this case is excessive under the Eighth Amendment, the Court need not decide whether a punitive damages award that exceeds any one, or even two or three, of these objective standards is excessive. That is because the award in this case exceeds *all* of them. The five charts attached as Appendices "A" through "E" to this brief demonstrate that the punitive damages award of $6 million greatly exceeds every objective indicium of proportionality provided by the Vermont legislature, by other Vermont juries that have awarded punitive damages, and by every other legislature in the United States (including Congress) that has specified permissible punitive damages or criminal fines for antitrust conduct such as predatory pricing.[19]

[19] Appendix "A" shows that the Vermont legislature has specified various forms of limits on punitive damages awards for a wide variety of wrongful conduct. The $6 million punitive award here is more than 100 times larger than the compensatory damages; yet the largest multiple that the Vermont legislature has specified is a punitive award ten times the sum wrongfully obtained by the defendants, and the largest dollar sum specified is $10,000.

Similarly, Appendix "B" shows that the Vermont legislature has specified a wide variety of civil fines for a wide variety of wrongful conduct ranging from various fraudulent actions to dan-

Thus, to declare the award excessive, the Court need conclude only that, at a bare minimum, when a state establishes no predetermined maximum punitive damages that may be awarded for a particular type of misconduct and allows a jury unguided discretion to award whatever sum they might choose to award, a sum of punitive damages awarded for that misconduct violates the Excessive Fines Clause if it exceeds (1) the maximum legislatively established criminal fine for conduct of the same or similar gravity, (2) the maximum legislatively established civil fine for conduct of the same or similar gravity, (3) the maximum legislatively fixed punitive damages awards for misconduct of the same or similar gravity; *and* (4) the maximum discretionary punitive damages award in a final judgment for conduct of the same or similar gravity in the same state.

In sum, the punitive damages judgment in this case vastly exceeds every legislatively established penalty, civil or criminal, for any form of nonviolent wrongful conduct in the State of Vermont, and every legislatively established punitive damages award for the identical conduct—predatory pricing—in every state in the nation with a specified punitive damages award for that type of conduct. If the Excessive Fines Clause's prohibition of disproportionate fines is to have any significance, it must require reversal of that judgment.

---

gerous uses of radioactive material. The punitive award in this case is some 300 times larger than the largest civil fine for which a dollar maximum is specified.

Appendix "C" lists a wide variety of the legislatively established criminal fines in the State of Vermont. The punitive damages award in this case exceeds by millions of dollars, and by a multiple of more than 200, any specified fine for any nonviolent crime in the State of Vermont.

Appendix "D" shows that the punitive damages award in this case also vastly exceeds the legislatively specified maximum punitive damages for predatory pricing activity in every one of the forty-three states that specifies a measure of punitive damages for antitrust conduct. *See also* 15 U.S.C. § 15 (1982) (specifying treble damages and reasonable attorneys' fees as relief in antitrust actions).

Appendix "E" shows that the judgment also exceeded every reported prior punitive damages award, for every type of conduct, no matter how serious, how violent, or how harmful, in the history of the State of Vermont. *See, e.g., Greenmoss Builders, Inc.*, 143 Vt. 66, 461 A.2d 414 (punitive damages judgment of $300,000 for libel).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit affirming the district court's punitive damages judgment should be reversed.

Respectfully submitted,

VICTOR E. SCHWARTZ
LIBERTY MAHSHIGIAN
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

HERBERT L. FENSTER
STANLEY W. LANDFAIR
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

MALCOLM E. WHEELER
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
Suite 3400
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

Attorneys for the Amici Curiae